

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

WILLIAM BARBERA,

Appellant,

v.

DEPARTMENT OF LICENSING,

Respondent.

) Case No. DISM-02-0039

)
) FINDINGS OF FACT, CONCLUSIONS OF
) LAW AND ORDER OF THE BOARD

I. INTRODUCTION

1.1 **Hearing.** This appeal came on for hearing before the Personnel Appeals Board, WALTER T. HUBBARD, Chair; GERALD L. MORGEN, Vice Chair; and BUSSE NUTLEY, Member. The hearing was held in the Pine Conference Room at the West Seattle Training Center in Seattle, Washington, on August 19, 2003 and August 20, 2003.

1.2 **Appearances.** Appellant William Barbera was present and was represented by Jean Schiedler-Brown, Attorney at Law, of Schiedler-Brown and Associates, P.S. Mark Anderson, Assistant Attorney General, represented Respondent Department of Licensing.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of dismissal for neglect of duty, insubordination, gross misconduct, and willful violation of published employing agency or Department of Personnel rules or regulations. Respondent alleged that Appellant sent inappropriate electronic messages and was rude to customers and co-workers.

II. FINDINGS OF FACT

2.1 Appellant was a permanent employee for Respondent Department of Licensing. Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on May 22, 2002.

2.2 Appellant's personnel file contained the following:

- On August 25, 1999, Appellant received a letter of reprimand for acting in an unprofessional, rude, and demeaning manner toward a co-worker in the presence of customers and for inappropriate use of his office computer.
- On April 10, 1998, Appellant received a letter of reprimand for inappropriate use of electronic mail.
- Appellant's supervisor, Joann Ryan, addressed a number of concerns with him in his 1998 performance evaluation. Ms. Ryan specifically addressed his need to use his computer for state business only, exhibit patience with customers, improve interpersonal communication skills, provide courteous service, and use tact and diplomacy when dealing with others.
- On October 10, 1997, Appellant was the subject of formal disciplinary action when his salary was reduced by 10 percent for 30 days. Appellant was charged with neglect of duty, insubordination, and willful violation of published employing agency or Department of Personnel rules or regulations for treating a customer in a disrespectful manner, failing to maintain confidentiality of a customer's driving records, and acting in an insubordinate manner towards his supervisor.

2.3 At the time of his dismissal, Appellant was a Licensing Services Representative 2 with the Downtown Seattle Licensing Services Office. Appellant began working for the Department of Licensing as a temporary employee in May 1992. Appellant became a permanent Licensing Services Representative 1 and later promoted to a Licensing Services Representative 2.

1 2.4 The Department's Licensing Services Representative Manual, Section 4.2, directs Licensing
2 Services Representatives to cooperate with their fellow employees and their supervisory personnel.
3 The manual further directs employees to conduct themselves in a courteous manner under all
4 conditions and to control their temper when dealing with the public.

5
6 2.5 The Department's Licensing Services Representative Manual, Section 5.2, requires
7 Licensing Services Representatives to be pleasant and maintain a professional and dignified
8 demeanor at all times.

9
10 2.6 The Department has adopted Licensing Policy ADM.39, Electronic Message Systems,
11 which requires employees to use the electronic message systems for state business purposes only.
12 The policy also prohibits employees from reading other employees' e-mail.

13
14 2.7 By letter dated May 16, 2002, Denise Movius, Assistant Director, informed Appellant of his
15 dismissal effective June 3, 2002. Ms. Movius alleged that Appellant sent inappropriate electronic
16 messages and was rude to customers and co-workers.

17
18 2.8 The issue here is whether Appellant engaged in rude behavior and sent inappropriate
19 electronic messages as alleged by Ms. Movius. Appellant claimed that he could not remember the
20 details of all the incidents. Appellant acknowledged that his behavior at times was inappropriate;
21 however, he contended that most of the time his actions and electronic messages were intended to
22 be humorous, and he believed that others would also find them humorous.

1 2.9 In making a determination of the allegations, we carefully weighed the testimony of the
2 witnesses and reviewed the documentary evidence in this case. Appellant's admission regarding
3 some of the events support a more than likely basis that the other incidents occurred as described by
4 the other witnesses. Based on a preponderance of the credible testimony and evidence provided, we
5 find that the following events occurred:

6
7 *2.10 Incident #1*

8 On July 26, 2001, Appellant sent an electronic message to his supervisor, Daryl Hamill, after being
9 verbally corrected for sending an inappropriate electronic message to a Department of Licensing
10 Program Manager. Appellant intended his e-mail to be a "humorous example letter" that
11 management could use to reprimand him regarding his use of the e-mail system. The e-mail read, in
12 part, as follows:

13
14 dearest billy boy, As necessarily determined by the actions you have voluntarily undertaken
15 I hereby submit this letter of reprimand. On the year of our Lord July twentieth, two
16 thousand and one you voluntarily responded to an unexpected and totally unnecessary, rude
17 and ridden with mis-information electronic mail from your Superior the Honorable Mr.
18 Hall... [Management is not] held to the same or higher level of behavior that you are, thus
while management may fire insults and relay their anger with impunity and the President of
the United States can indulge in illicit sexual behavior, you may NOT!!!! In fact, why don't
you just shut up you idiot. This electronic transmission is now eternally yours; Management

19 We find that Appellant's e-mail was rude, offensive, and inappropriate, and not an acceptable form
20 of humor under the circumstances.

21
22 *2.11 Incident #2*

23 On September 27, 2001, Appellant's co-workers witnessed a customer refusing to deal with
24 Appellant and asking for her money back. Appellant refused to refund the customer's money and
25 said to her, "You need to shut up and be quiet and let me finish my transaction." Appellant denies
26 that he told the customer to "shut up," and asserts that he told her to "quiet down."

1 We find that Appellant more likely than not told the customer to “shut up.” However, regardless of
2 whether Appellant used the words “shut up” or “be quiet,” we find his behavior to be rude,
3 unprofessional, offensive, and inappropriate.

4
5 *2.12 Incident #3*

6 On December 12, 2001, the headquarters office sent an e-mail to all staff inviting them to welcome
7 a new employee who previously worked at the Department of Agriculture. Appellant sent the
8 following e-mail to the new employee:

9
10 hello jody its so nice to have you here. I think that you will find that DOL is a lot like
11 Agriculture in that we are exposed to a lot of fertilizer like substances which I guess helps us
12 grow.

13 Appellant intended his e-mail to be “sarcastic humor” because he was frustrated at receiving
14 numerous frivolous e-mails at work. However, Appellant acknowledged that his e-mail to the new
15 employee was inappropriate. We find that Appellant’s e-mail was rude, offensive, and
16 inappropriate. Further, the content of his e-mail displays a disrespectful and negative attitude
17 toward the Department of Licensing.

18
19 *2.13 Incident #4*

20 On February 20, 2002, Appellant sent an electronic message to Mr. Hamill describing a January 29,
21 2002 event involving Loren, a co-worker. The e-mail read, in part:

22
23 I was at the counter helping a customer who was being nasty and uncivilized. Suddenly I
24 heard a loud ruckus, screaming and banging and stomping of feet. The customer at the
25 counter said, “What the hell is going on?” I said, “If you don’t settle down, I’m sending you
26 to the back room with that guy.” He quieted up and we completed the transaction much to
 the credit of Loren. ... I feel that this whole entire organization is at least a flagrant
 exhibitor of neurosis.

1
2 Appellant intended his comments to the customer to be an attempt to bring humor into the situation.
3 However, we find Appellant's comments to the customer to be inappropriate and unprofessional.
4 Further, Appellant's e-mail describing the event is another display of his negative attitude toward
5 the Department of Licensing.

6
7 *2.14 Incident #5*

8 On February 26, 2002, Appellant's co-worker, Peaudrey Nolan, approached Appellant about
9 correcting a customer's address. Appellant became upset and informed Ms. Nolan that he would
10 not correct the address. Appellant and Ms. Nolan exchanged a series of escalating insults that
11 became extremely offensive, profane, and hostile. The confrontation between Appellant and Ms.
12 Nolan was witnessed by co-workers and customers in the lobby. Ms. Nolan and some of the co-
13 workers later reported that Appellant's behavior during this incident caused them to fear for their
14 safety.

15
16 Appellant denied instigating the confrontation; however, he apologized for his participation and
17 acknowledged that his behavior was inappropriate. We find Appellant's behavior in this incident to
18 be inappropriate, unprofessional, offensive, and unacceptable.

19
20 *2.15 Incident #6*

21 On February 27, 2002, Appellant answered a phone call for his co-worker, Karla LaManna.
22 Appellant told the caller, "She is here and I don't know why, but if she is here to push me around
23 then I'm leaving now. I don't let women push me around." Later that day, Ms. LaManna heard
24 Appellant tell a customer that if they wanted correct and accurate information, Appellant was the
25 one to ask and that no one else in the entire state gave out correct information.

Appellant intended his comments during the phone call to be humorous; however, we find his explanation to be unacceptable. Further, even though Appellant denied telling the customer that he was the only one to ask for correct information, we find that he more likely than not made the comment. Once again, Appellant's behavior was rude, offensive, inappropriate, and unprofessional.

2.16 *Incident #7*

On February 28, 2002, a customer called Appellant to ask why she had not yet received her identification card. Appellant told the customer that she would never get her identification card because it was probably a fraud. When the customer reported this incident to the Department of Licensing, she indicated that Appellant had been rude to her on another occasion in the past.

Appellant denies telling the customer that her identification card was probably a fraud; however, we find the customer is more credible in her report of what occurred. We find Appellant's behavior in this instance to be unprofessional, rude, offensive, and inappropriate.

2.17 *Incident #8*

On February 28, 2002, Elizabeth Watson, Appellant's co-worker, observed Appellant reading Elizabeth Bergh's electronic mail. Ms. Bergh was Appellant's acting supervisor the previous day during the altercation with Ms. Nolan.

1 Appellant admitted that he read Ms. Bergh's e-mail. Appellant asserted that he was closing out the
2 computers in the office and Ms. Bergh had not logged off the computer before going home.
3 Appellant stated that he saw his name on one of her e-mails and felt compelled to read it. We find
4 that Appellant's behavior was inappropriate and unprofessional.

5
6
7 2.18 By letter dated April 4, 2002, Ms. Movius informed Appellant of the allegations of
8 misconduct and stated that she was considering taking disciplinary action up to and including
9 dismissal. On April 19, 2002, Ms. Movius met with Appellant and his representatives to give him
10 an opportunity to respond to the allegations.

11
12
13 2.19 After meeting with Appellant and reviewing his responses, Ms. Movius concluded that he
14 had failed to provide any mitigating circumstances or convincing explanations for his actions. Ms.
15 Movius determined that Appellant's behavior was unacceptable and that he had engaged in
16 misconduct. Ms. Movius determined that Appellant's behavior constituted neglect of duty,
17 insubordination, gross misconduct, and willful violation of published employing agency or
18 Department of Personnel rules or regulations and that substantial disciplinary action was necessary.

19
20
21 2.20 Because the mission of the Department of Licensing is to provide excellent customer
22 service, Ms. Movius was concerned by Appellant's repeated rude, offensive, and unprofessional
23 conduct that demonstrated his disregard for the established standards of customer service. Even
24 though Appellant had been given opportunities to correct his behavior, he had made no attempt to
25 do so and his behavior had not changed. In addition to Appellant's inability to behave appropriately
26 in the workplace and his inability to display appropriate humor, his behavior seemed to be

1 escalating and becoming more frequent. Further, Appellant had been repeatedly and unsuccessfully
2 counseled for his inappropriate use of his office computer.

3
4
5 2.21 In determining the level of discipline, Ms. Movius reviewed Appellant's personnel file,
6 performance evaluations, letters of reprimand, and the previous disciplinary salary reduction. Ms.
7 Movius concluded that termination was the appropriate sanction based on Appellant's history and
8 the serious nature of his overall misconduct.

9 10 **III. ARGUMENTS OF THE PARTIES**

11 3.1 Respondent argues that Appellant on numerous occasions sent inappropriate e-mails and
12 was rude to customers, supervisors, and co-workers. Respondent asserts that it is essential for the
13 Department of Licensing employees to follow the agency's mission and exhibit good customer
14 service skills. Respondent contends that in the past, Appellant's supervisors attempted to address
15 Appellant's inappropriate use of e-mail and unprofessional behavior to no avail. Respondent argues
16 that Appellant's continued inappropriate actions demonstrate that either he did not understand how
17 or why his behavior was inexcusable, or he was refusing to comply with the department's
18 instructions to correct his behavior. Respondent argues that Appellant's behavior had an adverse
19 impact on the agency's ability to carry out its business and his behavior continued to decline rather
20 than improve. Respondent asserts that Appellant's argumentative behavior had escalated to the
21 level that others began to fear for their safety.

22
23 3.2 Appellant argues that he performed his job well, and had satisfactory performance
24 evaluations from 1993 until 1996. Appellant asserts that he only had one performance evaluation,
25 which was in 1998 that indicated he needed to improve his interpersonal communication skills.
26

1 Appellant asserts that he uses humor in stressful situations and that he had never been told that his
2 humor was a problem. Further, there were times when his co-workers clearly found his humor to be
3 amusing. Appellant contends that he received disciplinary action in 1999 with no intervening
4 performance evaluations, counseling, or progressive discipline before being terminated in 2002.
5 Appellant asserts that he was told he had a history of behavior problems; however, that history was
6 never revealed to him and none of the allegations were brought to his attention until the February
7 26, 2002 incident. Appellant contends that P.J. Nolan instigated the incident on February 26, 2002;
8 however, he was dismissed and she was not disciplined. Appellant argues that dismissal was too
9 severe a sanction and asks the Board to reinstate him.

11 IV. CONCLUSIONS OF LAW

12 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter.

13
14 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
15 the charges upon which the action was initiated by proving by a preponderance of the credible
16 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
17 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
18 Corrections, PAB No. D82-084 (1983).

19
20 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
21 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
22 of Social & Health Services, PAB No. D86-119 (1987).

1 4.4 Respondent has met its burden of proving that Appellant neglected his duty to be courteous
2 and respectful to his co-workers when he engaged in exchanging offensive and profane insults with
3 Ms. Nolan, sent an inappropriate e-mail to a new department employee, and sent two inappropriate
4 e-mails to his supervisors. Further, Appellant neglected his duty to behave in a manner expected of
5 a Licensing Services Representative failed to provide courteous customer service when he was rude
6 to customers on three separate occasions. Appellant also neglected his duty to respect the privacy
7 of co-workers when he read Ms. Bergh's e-mail.

8
9 4.5 Insubordination is the refusal to comply with a lawful order or directive given by a superior
10 and is defined as not submitting to authority, willful disrespect, or disobedience. Countryman v.
11 Dep't of Social & Health Services, PAB No. D94-025 (1995).

12
13 4.6 Respondent has met its burden of proving that Appellant was insubordinate when he
14 continued to inappropriately use the agency's electronic mail and display rude behavior toward
15 customers and co-workers. Appellant had been counseled, reprimanded, and directed by his
16 supervisors to cease those behaviors; however, he continued to repeat his unacceptable behavior.

17
18 4.7 Gross misconduct is flagrant misbehavior that adversely affects the agency's ability to carry
19 out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant
20 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's
21 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

22
23 4.8 Respondent has met its burden of proving that Appellant engaged in gross misconduct when
24 his repeated rude and offensive behavior towards customers impacted the agency's ability to carry
25 out its mission of providing a high standard of courteous customer service.

1 4.9 Willful violation of published employing agency or institution or Personnel Resources
2 Board rules or regulations is established by facts showing the existence and publication of the rules
3 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
4 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

5
6 4.10 Respondent has met its burden of proving that Appellant willfully violated the Licensing
7 Services Representative Manual, Section 4.2, Licensing Services Representative Manual, Section
8 5.2, and the Department of Licensing Policy ADM.39, Electronic Message Systems.

9
10 4.11 Although it is not appropriate to initiate discipline based on prior formal and informal
11 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the
12 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.
13 D93-163 (1995).

14
15 4.12 In determining whether a sanction imposed is appropriate, consideration must be given to
16 the facts and circumstances, including the seriousness and circumstances of the offenses. The
17 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to
18 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the
19 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

1 4.13 Based on Appellant's egregious behavior and history of disciplinary and corrective action,
2 Respondent has established that the disciplinary sanction of dismissal was not too severe and was
3 appropriate under the circumstances presented here. Therefore, the appeal should be denied.
4

5 **V. ORDER**

6 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of William Barbera is denied.
7

8 DATED this _____ day of _____, 2003.
9

10 WASHINGTON STATE PERSONNEL APPEALS BOARD
11

12 _____
13 Walter T. Hubbard, Chair
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15 _____
16 Gerald L. Morgen, Vice Chair
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18 _____
19 Busse Nutley, Member
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